# United Electrical, Radio and Machine Workers of America (UE)

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April 17, 2018

Ms. Roxanne Rothschild,
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

**Re: Response to NLRB Request for Information Regarding the Board's 2014 Election Rule**

Dear Ms. Rothschild:

I am writing on behalf of the United Electrical, Radio & Machine Workers of America (UE) in response to your agency's Request for Information, originally published in the Federal Register on December 14, 2017 and subsequently amended, regarding the Board's 2014 Election Rule, which modified the Board's representation-election procedures.

***The Problem:***

Section 7 of the original Wagner Act promised that employees will have the right to, among other things, "bargain collectively through representatives of their own choosing." Today, this promise has not been fulfilled particularly through the virtually unchecked exercise of employer "free speech" during representation elections. Although the original Wagner Act intended to address the "inequality of bargaining power" between employees and employers, the reality of an organizing campaign is that employees and unions seeking to represent them find it difficult to match the employer's authority over the employee's livelihood. Repeatedly, our experience has shown that in areas such as Houston, TX, Chattanooga, TN and in New Jersey to name a few, upon the onset of an organizing campaign, employers will virtually halt all production. The business of the employer becomes defeating the employee's selection of a representative of his own choosing. Through time and speech conduct, employers are empowered to undermine the employee's choice of unionization or no-unionization. The 2014 modifications to the Election Rule, along with the UE's suggested changes, is an infinitesimal effort in the right direction to restore a laboratory conditions approach to representation elections, while at the same time permitting employers to exercise the free speech rights granted to them under the Taft-


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Hartley Act. The 2014 modifications and the UE's recommended changes, will, therefore, restore a Congressional promise to American workers—that they are guaranteed the right to select a representative of their own choosing.

***The Argument***

In *General Shoe Corp.*, 77 NLRB 124 (1948), the Board observed that:

> [w]hen we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls *for freedom of choice by employees as to a collective bargaining representative."* Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative. For this reason the Board has sometimes set elections aside in unconsolidated representation cases, in the absence of any charges or proof of unfair labor practice. When a record reveals conduct so glaring that it is almost certain to have impaired employees' freedom of choice, we have set an election aside and directed a new one. Because we cannot police the details surrounding every election, and because we believe that in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. The question is one of degree.

*Id.* at 126 (emphasis added). Thus was born the Board's "laboratory conditions" doctrine. This doctrine sought to implement the Wagner Act's promise of selecting a representative of one's "own choosing."

It is the UE's position that workers will never realize the promise of Section 7 (even as later amended under the Taft-Hartley Act) unless and until they have an opportunity to vote for unionization or no-unionization within the framework of the "laboratory conditions" doctrine, without interference from the employer or outside third-party groups.[1]

As it currently stands, the law, 29 U.S.C. § 158(c )("[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidenced of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."), the courts and the Board have assured American employers of a false premise – that they are a choice in an employee's vote for a representative "of his own choosing." Employers have been improperly led to believe that a vote in favor of unionization is a vote *against* them. This faulty belief is based upon unfortunate administrative and judicial opinions approving alleged employer "free speech" rights, *see, e.g., Thomas v. Collins,* 323

[1] In a representation election campaign at the Nissan plant in Mississippi, outside groups such as the Chamber of Commerce and the Republican party engaged in speech against union representation although, like the employer, they were not a candidate in the vote.

U.S. 516, 537 (1945). At this time, there is nothing to stop highly financed employers and their sympathizers, i.e., right-to-work groups, the Republican Party, from influencing representation-election campaigns with the goal of undermining confidence in union representation through social media, television and radio campaigns.

It is the UE's position that to restore the promise of Section 7, the 2014 Election Rule should be retained with modifications. Specifically, the Rule should be modified to provide for (1) an election to be held within five (5) days of the filing of a fully supported representation petition, (2) no speeches or electioneering by employers and their representatives after a representation petition has been filed; and (3) representation elections (employee voting) by Internet or other electronic means, or an alternative balloting process. Each of the UE's suggested modifications is founded on the text and the spirit of the original National Labor Relations Act, specifically, the Wagner Act, carefully balanced with employer "free speech" jurisprudence.

In December 1994, the U.S. Commission on the Future of Worker-Management Relations ("Dunlop Commission" or "Commission"), after an exhaustive twenty months of research, study and evaluation of the experiences of employers, employees, academics and others, issued a Final Report, including Recommendations on a variety of workplace issues. *See* "The Dunlop Commission on the Future of Worker-Management Relations – Final Report," U.S. Commission on the Future of Worker-Management Relations (1994), DigitalCommons@ILR: htttp://digitalcommons.ilr.cornell.edu/key_workplace/2 ("Final Report"). Although dated, there is no empirical evidence with the same breadth as the Final Report to suggest that the Commission's recommendations do not have continued validity. Therefore, the Report fully supports the UE's recommendations presented here.

For instance, the Commission recommended "prompt elections after the NLRB determines that sufficient employees have expressed a desire to be represented by a union." Final Report at 10. The Commission recommended a two week turnaround time for representation elections, *id., see also* at 39, rather than the five day time frame proposed by the UE here. The UE prefers the five day period it proposes as more optimal. Under the Commission's proposal, the employer, up to the representation election date, presumably is permitted to continue exercising free speech rights, thus frightening employees and removing from them any opportunity to selective a representative of "his own choosing" rather than of the employer's choosing. Under the UE's proposal, Although the employer does not have a place on the ballot, it may still exercise its free speech rights to support a "no representation" vote -- but not within the five day period of a representation election. "An employer may advertise his anti-union sentiments in the press or in public speeches," but he may "not address them directly to his employees in an effort to prevent their joining a union," Roger Baldwin, *Organized Labor and Democracy,* CIVIL LIBERTIES AND INDUSTRIAL CONFLICT 3, 27 (1938), during the five-day exclusionary period. During this period, the affected employees will have an opportunity to weigh the union's arguments for representation and to seriously consider their conditions of employment without interference, restraint or coercion.[2]

[2] The Commission also recommended that "challenges to bargaining units and other legal disputes be resolved after the elections are held." Final Report at 10. The 2014 modifications appropriately streamlined some of the issues that previously resulted in significant delays for representation elections. *See,* e.g., 29 C.F.R. §§ 102.63(a), (b), 102.64 (a), 102.66, 102.67, and 102.69.

To support its recommendation for "prompt certification elections" the Final Report observed:

> The Commission's Fact Finding Report confirmed that the process by which workers decide whether or not to engage in collective bargaining is among the most contentious aspects of American labor relations. In order to have a union certified as their representative, American workers must seek an NLRB election to determine whether a majority of an appropriate bargaining unit wishes to be represented by the union. Before holding an election, the Board must address legal issues raised by the employer and union, most importantly, the scope of the bargaining unit, and inclusion or exclusion of particular employees therein. Either party has a right to a formal hearing on these matters, which causes a substantial delay. [Former] NLRB General Counsel Frederick Feinstein told the Commission that the automatic [availability] of such hearing procedures means that a party seeking delay 'can safely assume' that it will be able to push an election back three to six months. In practice, it takes an average of seven weeks for workers to secure a vote from the time their petition is filed.
>
> During this time, the union and employer typically face off in a heated campaign. The government has been hesitant to regulate the two sides too closely during these contests in order to preserve the parties' freedom of speech. Both sides often hurl allegations, distortions, and promises that poison the relationship and make it difficult to achieve a collective bargaining agreement in cases where the workers vote to unionize.

Here, it is important to note that even the Dunlop Commission's Fact-Finding Report promotes the false concept of a "contest" between the employer and the union to "preserve the parties' freedom of speech," when, in fact, the employer is not a contestant in the "fight." A vote for an employee to select a "representative of his own choosing" is not the same as a political-style election. Unlike a political election, the employer does not "lose" anything when the vote is for unionization. Thus, while employers are, and perhaps should be, recognized as a "party" for purposes of participating in issues affecting the representation petition, they do not have an actual stake in the election's outcome. In short, eliminating employer "free speech" during the five day period before a representation election does not adversely affect the employer, or its interests, one way or another.

The Report continued:

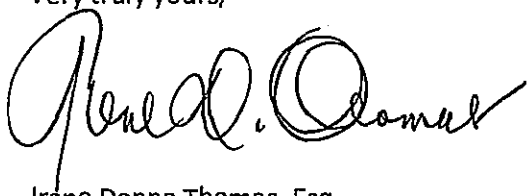
> The Fact Finding Report revealed that in recent decade's employer unfair labor practices during these campaigns have risen: both in terms of the ratio of unfair labor practice charges against employers to the number of elections and the percentage of such charges found to have merit. In particular, discharges of union activists are up: the data show that improper dismissals occur in one of every four elections. American workers are afraid of this prospect: 79 percent say it is likely that employees who seek union representation will lose their jobs, and 41 percent of nonunion workers say they think

> they might lose their own jobs if they tried to organize. This fear is no doubt one cause of the persistent unsatisfied demand for union representation on the part of a substantial minority of American workers. The Worker Representation and Participation Survey reported that 32 percent of nonunion workers would vote for a union and think their co-workers would too.

This finding further supports the need for limiting employer "free speech" rights in the days before a representation election takes place. Most workers are afraid that they will lose their jobs if they select a union. This evidence of fear severely undermines the alleged guarantee of freely selecting a representative of one's "own choosing."

Finally, to support an employee's opportunity to select a representative of his own choosing, he must have an opportunity to vote. The UE respectfully recommends that in addition to voting on the employer's premises, employees should be permitted to vote by mail-in ballot or by some other *secure* electronic means of exercising the right to vote. These procedures will permit an employee to vote his choice for unionization or no-unionization in his own home, without the pressure of the employer or his third-party representatives.

Very truly yours,



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cc: Peter Knowlton, General President
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